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No. 91-1609

In The

Supreme Court of the United States

October Term, 1991

MAGDY F. ANIS,

Petitioner,

v.

NEW JERSEY COMMITTEE ON ATTORNEY ADVERTISING; DISCIPLINARY REVIEW BOARD OF THE STATE OF NEW JERSEY; HONORABLE JUSTICES OF THE NEW JERSEY SUPREME COURT,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether petitioner can claim First Amendment protection for sending a false and misleading solicitation letter to the family of an air disaster victim the day after their son's body was identified?

2. Whether the Supreme Court of New Jersey may, consistent with the First Amendment, place reasonable, limited time restrictions on attorneys' ability to make targeted direct mailings soliciting business from the families of victims of recent disastrous accidents?

3. May a State attorney disciplinary committee amend charges against an attorney, based on newly discovered evidence which was elicited at a disciplinary hearing, but which was not presented as a part of the attorney's defense to the original charges, and where the attorney had a full opportunity to present a defense to the amended charges before the Committee and before the State Supreme Court?

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COUNTERSTATEMENT OF THE CASE

This case arises from a disastrous incident on December 21, 1988, in which a Pan American aircraft exploded over Lockerbie, Scotland. One of the passengers aboard the airplane was Alexander Lowenstein, a college student from Morristown, New Jersey. On January 4, 1989, one day after Alexander Lowenstein's remains were identified, petitioner Magdy F. Anis ("petitioner") sent a personalized, targeted solicitation letter to Alexander's father, Peter Lowenstein (Pa7).

Petitioner's letter represented that he and his law partner were "experienced practitioners in the personal injury field, and feel that we can obtain a favorable outcome for you against the airline, among other possible defendants." (Pa7). The letter also offered to represent Mr. Lowenstein at an allegedly reduced fee, which petitioner represented would be below the "customary one-third fee that most other attorneys routinely charge." (Pa8). On January 12, 1989, Peter Lowenstein filed an ethics complaint against petitioner.* As a result of the filing of his complaint, the Committee on Attorney Advertising filed a formal complaint against petitioner alleging that he had violated *N.J.S.Ct.RPC* 7.3(b)(1), which provides that

> (b) A lawyer shall not contact, or send a written communication to, a prospective client for

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* The complaint originally also named petitioner's brother, who was his law partner. After proceedings before the Disciplinary Review Board, however, those charges were dismissed (Pa10).

> the purpose of obtaining professional employment if:
>
> > (1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

Petitioner was also charged with engaging in false and misleading advertising by sending a letter that was misleading and contained material misrepresentations, in violation of *N.J.S.Ct.RPC* 7.1(a)(1), in that the letter failed to indicate the amount of petitioner's actual fee, failed to indicate any range of fees for the legal services to be rendered, and indicated that the customary fee charged by other attorneys would be one-third, notwithstanding *N.J.S.Ct.R.* 1:21-7, which prohibits charging such a high fee on a recovery in excess of $250,000 (Pa8 to Pa9).

During the course of the disciplinary hearing before the Committee on Attorney Advertising, the Chairman of the Committee addressed several questions to petitioner concerning the extent of his experience in the practice of law. Petitioner did not raise the issue of his own experience as part of his defense. Rather, the Chairman raised the issue in the course of attempting to determine the basis for petitioner's purported belief that the maximum possible recovery in the case would have been $75,000 (Pb20 to Pb21). The hearing lasted one day; several days after the hearing, the Committee permitted the complaint to be amended to include an additional allegation that petitioner had misrepresented the level of his legal experience in the solicitation letter (Pa47). Petitioner was given the opportunity for additional hearing days in

which to respond to that amended complaint, but he declined to take advantage of that opportunity (Pb7).

In its decision, the Committee found by clear and convincing evidence that petitioner had engaged in false and misleading advertising. The Committee found that petitioner's letter had misrepresented the permissible fee to be charged in a personal injury case of the type involved here, and misrepresented both the professional background of petitioner and his law partner. The Committee found, and it was undisputed, that petitioner had been admitted to the bar only one year prior to sending the letter in question, that neither he nor his partner was a certified civil trial attorney, and that neither of them had ever tried a case to a judge or a jury or handled a personal injury matter involving the negligence of an airline (Pa9). The Committee recommended that petitioner be publicly reprimanded. The Disciplinary Review Board, which by Supreme Court rule reviews the disciplinary recommendations of the Committee, agreed that petitioner had engaged in unethical conduct, but recommended a private reprimand instead of a public reprimand (Pa10).

Upon review of the decision of the Disciplinary Review Board, the Supreme Court of New Jersey determined that a public reprimand was the appropriate discipline. After reviewing the increasing problem of "lawyers and their agents preying on victims of disaster" (Pa5), the Court determined that its rule prohibiting direct solicitation of potential clients at a time when their physical, emotional or mental state is such that they could not exercise reasonable judgment in employing an attorney,

was consistent with the First Amendment. The Court reasoned that

> Whatever doubts may exist about the outer limits embraced by *RPC* 7.3(b)(1), any reasonable lawyer would conclude that an obsequious letter of solicitation delivered the day after a death notice would reach people when they 'could not exercise reasonable judgment in employing a lawyer. . . . ' *RPC* 7.3(b)(1). [Pa14]

In order to ensure that the rule was as narrowly tailored as possible to the state interest it served, the Court in its decision indicated that it was referring the rule to the Committee on Attorney Advertising for further study to determine how the rule might be made more precise. Pending the outcome of that reconsideration, the Court determined that it would not impose discipline on attorneys for truthful solicitation letters sent "more than two weeks after such a disaster occurs and loss becomes known." (Pa17).

Based on an independent review of the record, the Supreme Court of New Jersey also found by clear and convincing evidence that petitioner had engaged in misleading advertising by misstating the customary fee permitted in an airline negligence case, and by falsely implying "that he was experienced in litigating aircraft accidents." (Pa17 to Pa18). With respect to the latter claim, the Court found that "nothing could be further from the truth." (Pa18). Finally, the Court found that the amendment of the charges before the Committee did not violate due process, because petitioner had ample opportunity to respond to the charges and was not prejudiced by the amendment (Pa9).

SUMMARY OF ARGUMENT

Petitioner Magdy F. Anis ("petitioner") cannot claim First Amendment protection for his advertising in this case, because the targeted solicitation letter which he sent to the family of a recently deceased air disaster victim was fraudulent and misleading as well as overreaching. Hence, his commercial speech in this case is not entitled to First Amendment protection, and he cannot invoke the overbreadth doctrine to challenge the rule on behalf of persons whose advertisements are not false and misleading. Moreover, the challenged disciplinary rule, *N.J.Sup.Ct.RPC* 7.3(b)(1), is constitutional, because it represents a limited restriction on the timing of attorney advertising, rather than a blanket prohibition on targeted, direct mail solicitation. As construed by the Supreme Court of New Jersey, the rule provides a limited, two week "breathing space" for the families of victims of disastrous accidents, during which attorneys are not permitted to target them with direct mail solicitations. The rule is clearly constitutional and does not merit scrutiny by this Court, particularly since the Supreme Court of New Jersey is currently in the process of reviewing the rule to determine whether its limitations can be further fine-tuned. Finally, the amendment of the disciplinary charges against petitioner did not violate due process, since information concerning the petitioner's lack of experience was brought out on questioning by the Chairman of the Attorney Advertising Committee, and was not presented by the petitioner as part of his defense; hence, unlike *In re Ruffalo*, 390 *U.S.* 544 (1968), the disciplinary proceeding did not serve as a "trap" for petitioner in which he would inculpate himself while presenting a defense to the original charges. Rather, the amended

charge was based on newly discovered, but undisputed, facts which were tangential to the original charge.

ARGUMENT

POINT I

THE PETITION SHOULD BE DENIED BECAUSE PETITIONER'S ADVERTISEMENT IN ITS TOTALITY WAS OVERREACHING, FRAUDULENT AND MISLEADING, AND THEREFORE UNWORTHY OF FIRST AMENDMENT PROTECTION.

It is well established that the overbreadth doctrine does not apply to First Amendment challenges involving commercial speech. *Bd. of Trustees, S.U.N.Y. v. Fox*, 492 *U.S.* 469, 483-484 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 *U.S.* 466, 478 (1988); *Bates v. State Bar of Arizona*, 433 *U.S.* 350, 380 (1977). Therefore, a petitioner seeking to challenge a restriction on commercial speech must show that his particular advertisement is worthy of First Amendment protection. A petitioner whose advertisement is false and misleading, and therefore unworthy of First Amendment protection, cannot assert the rights of those whose conduct might be entitled to protection. *See, e.g., Bd. of Trustees, S.U.N.Y. v. Fox, supra*, 492 *U.S.* at 483-484; *In re R.M.J.*, 455 *U.S.* 191, 200 (1982) (false and misleading advertisement is not protected by the First Amendment and may be prohibited).

In this case, petitioner's letter, taken as a whole, is a classic example of misleading advertising for which he was properly reprimanded by the Supreme Court of New Jersey. Shortly after a massive aircraft disaster, and one day after Peter Lowenstein's son's body was identified,

petitioner sent Mr. Lowenstein a letter seeking to represent him against the airline and other parties. The letter, which was personalized and referred to the dead son by name,* grossly misrepresented petitioner's level of experience, assured Mr. Lowenstein of petitioner's belief that he could obtain a successful result in litigation, and offered an allegedly reduced fee, below what petitioner falsely represented was the "customary one-third fee that most other attorneys routinely charge." (Pb5). Nothing in this Court's past decisions mandates First Amendment protection for this sorry example of overreaching and abuse.

This Court has repeatedly ruled that false and misleading advertising may be prohibited. *See, e.g., In re R.M.J., supra; Zauderer v. Office of Disciplinary Counsel,* 471 *U.S.* 626 (1985). Petitioner's letter in this case was unquestionably false and misleading. Petitioner represented in the letter that he and his partner were experienced in personal injury litigation. In fact, neither petitioner nor his partner had ever handled an aircraft accident case; nor, for that matter, had either partner ever actually tried a case of any kind before either a jury or a judge. In fact, at the time that petitioner sent the letter, he had been admitted to the practice of law for only one year. Particularly in combination with petitioner's assurances to Mr. Lowenstein that he and his partner could

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* This Court recognized in *Shapero, supra,* that a "personalized" letter presents an increased risk of deception, because, *inter alia,* it could lead the recipient to overestimate the attorney's familiarity with the case. 486 *U.S.* at 476.

obtain a successful result in the proposed litigation, this misrepresentation was inexcusable.*

In addition, petitioner represented that the "customary fee" charged by other attorneys was one-third of the recovery (Pb5). The Supreme Court of New Jersey correctly found that this statement was misleading, since the New Jersey Court Rules explicitly prohibit attorneys from charging a one-third fee for recoveries over the amount of $250,000. *N.J.S.Ct.R.* 1:21-7. The rule limits the fee to 25% on recovery between $250,000 and $500,000, and 20% of the next $500,000 recovered. The New Jersey Supreme Court properly discounted petitioner's claim that the Warsaw Convention would limit Mr. Lowenstein's potential recovery to $75,000. As the Court noted, the Warsaw Convention does not apply to willful misconduct by an airline (Pa17). Moreover, petitioner's letter explicitly referred to the possibility of suing "other possible defendants" against whom petitioner believed he could obtain "a favorable outcome." (Pa7). Clearly, a State Supreme Court is entitled to hold attorneys to a high standard of truthfulness in their advertising. Moreover, as this Court recognized in the case of *In re R.M.J., supra,* 455 *U.S.* at 200:

> Because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other

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* The Supreme Court of New Jersey has previously imposed the same discipline meted out here, a public reprimand, for misrepresentation by an attorney of his level of experience in an advertisement. *Matter of Caola,* 117 *N.J.* 108 (1989).

> advertising may be found quite inappropriate in legal advertising. [*quoting Bates v. State Bar of Arizona*, 433 *U.S.* 350, 383 (1977)].

The fact that many ordinary citizens, being unaware of the limits that the New Jersey Court Rules place on attorney fees, would "perceive a one-third fee in contingency cases" (Pb27) does not excuse petitioner's misrepresentation here. If anything, it exacerbates its seriousness. Petitioner had a duty to accurately state the facts in his advertisement, not play upon the public's misconceptions.*

For all of these reasons, petitioner's advertisement here clearly fell outside the protection of the First Amendment. Not only did he send a personalized targeted letter to an air disaster victim's grieving family, at a moment of their extreme distress and vulnerability, but he compounded this overreaching with false and misleading statements concerning his fees and experience. This Court therefore need not, and should not, entertain petitioner's First Amendment attack on *N.J.Sup.Ct.RPC* 7.3(b)(1).

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* In *Peel v. Attorney Reg. and Disciplinary Com'n*, 110 *S.Ct.* 2281 (1990), Justice White noted that five Justices of this Court found Peel's listing of his certification as a trial specialist to be either misleading or potentially misleading. Petitioner's conduct here is far more egregious than the conduct at issue in *Peel*. (110 *S.Ct.* at 2297, White, J., dissenting).

POINT II

THE PETITION SHOULD BE DENIED BECAUSE *N.J.Sup.Ct.RPC* 7.3(B)(1), AS CONSTRUED BY THE SUPREME COURT OF NEW JERSEY, IS A REASONABLE RESTRICTION ON THE "TIME, PLACE AND MANNER" OF ATTORNEY ADVERTISING, WHICH IS CONSISTENT WITH THE FIRST AMENDMENT, AND BECAUSE THE RULE IS CURRENTLY UNDER RECONSIDERATION TO DETERMINE WHETHER A STILL MORE PRECISE LIMITATION MAY BE CRAFTED.

As an essential element of its power to protect the public health, safety and welfare, a State has "broad power[s] to establish standards for licensing practitioners and regulating the practice of professions. . . . " *Goldfarb v. Virginia State Bar*, 421 *U.S.* 773, 792 (1975). The "State's compelling interest" in the regulation of the professions is "especially great" with regard to the legal profession since lawyers are essential to the governmental function of administering justice and have historically been "officers of the courts." *Ibid. See also Ohralik v. Ohio State Bar Association*, 436 *U.S.* 447, 459 (1978); *In re Primus*, 436 *U.S.* 412, 438 (1978). The State's interest in regulating the legal profession includes an interest in maintaining public confidence in the propriety of the conduct of those associated with the administration of justice. *IBM Corp. v. Levin*, 579 *F.*2d 271, 283 (3d Cir. 1978).

In ruling on cases involving attorney advertising, this Court has repeatedly indicated that the State may further its legitimate interest in regulating the legal profession by placing "reasonable restrictions on the time, place, and manner of advertising." *Bates v. State Bar of Arizona*, 433 *U.S.* 350, 384 (1977); *In re Primus, supra*, 436 *U.S.* at 438; *In*

re R.M.J., 455 *U.S.* 191, 201 n. 13 (1982). The Court has not restricted the State's power over professional advertising to prevention of misleading or deceptive practices. In *Friedman v. Rogers*, 440 *U.S.* 1, 9 (1979), the Court stressed that

> 'some forms of commercial speech regulation are surely permissible.' *Virginia Pharmacy, supra*, at 770, 48 *L.Ed.*2d 346, 96 *S.Ct.* 1817; *accord Bates, supra*, at 383,. . . . For example, restrictions on the time, place and manner of expression are permissible provided that 'they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.' [citation omitted]. *Equally permissible* are restrictions on false, deceptive, and misleading commercial speech. [emphasis added].

Likewise, in *In re R.M.J., supra*, 455 *U.S.* at 207, the Court indicated that in addition to preventing misleading advertising, "[t]here may be other substantial state interests as well that will support carefully drawn restrictions." *See also Central Hudson Gas v. Public Service Com'r*, 447 *U.S.* 557, 571 (1980). These interests include restricting advertising which presents a significant potential for overreaching of prospective clients. *Ohralik, supra*, 436 *U.S.* at 462.

Contrary to petitioner's contentions, *Shapero v. Kentucky Bar Ass'n*, 486 *U.S.* 466 (1988), does not prohibit reasonable restrictions on the timing of direct mail solicitations by attorneys. The issue in *Shapero* was whether the State may "categorically prohibit" attorneys from

soliciting business by sending "truthful and nondeceptive letters to potential clients known to face particular legal problems." *Id.* at 468. The Court reiterated its longstanding rule that " 'commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.' " *Id.* at 472, *quoting Zauderer v. Office of Disciplinary Counsel*, 471 *U.S.* 626 (1985). In *Board of Trustees, S.U.N.Y. v. Fox, supra*, the Court reaffirmed the State's power to regulate the time, place and manner of advertising, provided that the restrictions are narrowly tailored to serve a significant governmental interest. The Court in *Fox* ruled, however, that the State's regulations need not encompass the least restrictive alternative so long as their scope is "in proportion to the [State] interest served." 492 *U.S.* at 478. The State regulation at issue here regulates the timing of direct mail solicitations, consistent with this Court's prior rulings.

In its decision below, the Supreme Court of New Jersey reviewed the increasing problem of abusive attorney solicitation of recent disaster victims, the potential this activity has for inflicting unnecessary additional emotional distress on survivors, and the potential for overreaching. The Court made a finding that families of disaster victims are vulnerable and would have difficulty making a reasoned judgment as to the retention of counsel. The Court found that "an ordinarily prudent attorney would recognize that within the hours and days following a tragic disaster, families would be particularly weak and vulnerable." 599 *A.*2d 1265, 1270 (1992). The Court

further properly reasoned that "[n]othing in the Constitution, . . . requires us to countenance solicitation that intrudes upon victims or their families in the initial throes of their grief." *Id.* at 1271. Justice Handler, concurring, further emphasized the rule's purpose to prevent "harassment and overreaching" of potential clients. *Id.* at 1273. For the future guidance of the Bar, the Court made a reasoned determination, for interim purposes, that it would not enforce the rule for advertisements sent out more than two weeks following the occurrence of a disaster and the discovery of loss by the target of the solicitation. The Court, however, referred the rule to a committee for further review to determine whether the limitation could be made more precise.

Faced with a similar issue, the Supreme Court of Florida has recognized the reasonableness of giving disaster victims and their families a short "breathing space" during which attorneys would not be permitted to solicit their business. *The Florida Bar: Petition to Amend Rules*, 571 *So.*2d 451 (Fla. 1990). That Court ruled that consistent with the decisions in *Shapero* and *Fox*, mailings could be restricted to no earlier than 30 days after the incident giving rise to the injury. Likewise, in *Spencer v. Honorable Justices of Supreme Ct. of Pa.*, 579 *F. Supp.* 880 (E.D. Pa. 1984), aff'd 760 *F.*2d 261 (3d Cir. 1985), the court recognized that a state could ban direct mailings in identified circumstances in which direct mail recipients could be particularly vulnerable or susceptible to the persuasive influence of a targeted attorney solicitation letter.*

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* *Matter of Von Weigen*, 470 *N.E.*2d 838 (N.Y. 1984), cited by petitioner (Pb12), involved a "blanket prohibition of mail

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Clearly, the State has a substantial interest in preventing attorneys from taking unfair advantage of potential clients. *Ohralik v. Ohio State Bar Assn., supra,* 436 *U.S.* at 462. The Court below reasonably determined that the period immediately after a disaster presents an unusually high risk of overreaching and exploitation. The Court also reasonably determined that the State has an interest in holding attorneys to some minimal standards of decency in their conduct toward potential clients, if for no other reason than to uphold public confidence in the integrity of the Bar and the justice system of which attorneys are an integral part. *Ohralik, supra,* 436 *U.S.* at 460-461; *IBM Corp. v. Levin, supra,* 579 *F.*2d at 283. Requiring attorneys to wait a few days before soliciting

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solicitation of accident victims", *Id.* at 841, rather than the very limited timing restriction at issue here. Moreover, the Court there found no "history that the practice has led to abuses." *Id.* at 843. Here, the Supreme Court of New Jersey has found evidence of a growing pattern of abuse which needed to be addressed (Pa5 to Pa6). The case of *Unnamed Attorney v. Attorney Grievance Commission,* 545 A.2d 685 (Md. 1988) concerned a motion to quash a subpoena which was supposedly aimed at determining whether petitioner had violated the confidentiality of medical records in order to obtain the names of recent accident victims. In passing upon the validity of the subpoena, the Court questioned the validity of a rule facially similar to *N.J.S.Ct.RPC* 7.3(b). The Court did not, however, directly rule upon the validity of the restriction, and its validity was tangential to the Court's central finding that the subpoena constituted a "fishing expedition" based upon a "bald supposition" that petitioner had improperly obtained confidential medical records. *Id.* at 691. Moreover, the Maryland rule was not subject to the narrowing construction which the Supreme Court of New Jersey has placed upon *N.J.S.Ct. RPC* 7.3(b)(1).

business from the grieving families of disaster victims, giving the survivors a chance to regain their composure sufficiently to be able to make a reasoned judgment as to the retention of counsel, is a reasonable "time, place and manner" restriction on attorney advertising. The rule serves a substantial State interest in protecting potential clients against overreaching and harassment and, as construed by the Supreme Court of New Jersey, is narrowly tailored to directly serve that interest. *See, e.g., Bd. of Trustees, S.U.N.Y. v. Fox, supra; Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 *U.S.* 328, 339 (1986) (Supreme Court will abide by the narrowing construction given to State regulations or statutes by the State courts). As this Court held in *Fox*, so long as the rule restricts speech only "in proportion to the [State] interest served," 492 *U.S.* at 478, it will be upheld, even if it is not the least restrictive possible alternative. *Id.* Plainly, the rule in question here meets the standard of *Fox* and is consistent with this Court's ruling in *Shapero*. Moreover, in its decision the Supreme Court of New Jersey indicated that it is currently reconsidering the rule to determine whether an even more precise limitation can be crafted. 599 *A.*2d at 1271.

For all of the reasons set forth above, it is clear that *N.J.S.Ct.RPC.* 7.3(b)(1) is valid on its face and would have been constitutionally applied to petitioner's conduct, even if, as discussed in Point I, *supra*, his advertising letter had not been false and misleading. Consequently, there is no reason for this Court to grant the petition for a writ of certiorari. Moreover, since the Supreme Court of New Jersey is currently reconsidering this rule, this Court should refrain from granting the petition, even if it were

otherwise inclined to do so, because the scope of the final rule to be adopted by the State Court is not yet known.

POINT III

THE AMENDMENT OF THE CHARGES AGAINST PETITIONER WAS CONSISTENT WITH DUE PROCESS, BECAUSE THE AMENDMENT WAS NOT BASED UPON THE DEFENSE PRESENTED BY PETITIONER AT THE DISCIPLINARY HEARING BELOW, AND BECAUSE PETITIONER HAD AMPLE OPPORTUNITY TO PRESENT A DEFENSE TO THE CHARGE BOTH BEFORE THE COMMITTEE ON ATTORNEY ADVERTISING AND BEFORE THE SUPREME COURT OF NEW JERSEY.

The Supreme Court of New Jersey issued a public reprimand to petitioner because, among other things, his solicitation letter grossly misrepresented his level of experience. Although he represented that he was experienced in the handling of personal injury matters, at the time he sent the letter petitioner in fact had only been admitted to practice law for one year, had never handled an aircraft accident case, and had never tried a case of any sort before either a jury or a judge. Petitioner's efforts to invoke *In re Ruffalo*, 390 *U.S.* 544 (1968) in his defense are unavailing. In *Ruffalo*, an attorney was charged with using an agent to solicit business. His defense to the charge was that the supposed "agent" was really only an investigator, who was a railroad employee moonlighting by working for Ruffalo. He was then charged, based solely on his own defense testimony, with improperly hiring a railroad employee to investigate the employee's own employer railroad. Ruffalo was disbarred based on the amended charge. This Court found

that the amendment of the charge, based on Ruffalo's own defense, violated due process.

As this Court has recognized, however, *Ruffalo* does not stand for the proposition that attorney disciplinary charges can never be amended to include new charges after the disciplinary hearing has commenced. In fact, in *Zauderer, supra,* an attorney was charged, among other things, with misleading advertising based on his offer to defend drunk driving cases and forego his fee if the client was found guilty. The State Supreme Court found that the ad was misleading, but on different grounds than those originally relied on by the Office of Disciplinary Counsel. Zauderer raised *Ruffalo* as a defense. This Court rejected his arguments and distinguished *Ruffalo* as follows:

> The feature of that case that was particularly offensive was that the change [in the charges] was such that the very evidence put on by the petitioner in defense of the original charges became, under the revised charges, inculpatory. Thus, in that case, the original charges functioned as a 'trap' . . . in this case the variance between the theory of the Office of Disciplinary Counsel and the Board of Bar Commissioners had no such prejudicial effect on appellant. [471 *U.S.* at 655 n. 18].

As in *Zauderer,* petitioner here was charged with false and misleading advertising based on one particular advertisement, here his letter to Mr. Lowenstein. During the hearing, the Chairman of the Attorney Advertising Committee asked petitioner several questions about his experience, in the course of trying to determine why petitioner thought that the Warsaw Convention would limit recovery to $75,000, an award subject to a one-third

contingency fee. Testimony concerning petitioner's experience was not a part of petitioner's defense; he did not, for example, seek to claim lack of experience as a mitigating factor in defending against the charges. Hence, unlike *Ruffalo*, the original charge did not in any way serve as a "trap" for petitioner. Like *Zauderer*, the amendment simply recited another way in which petitioner's solicitation letter was misleading. Since the hearing revealed evidence of an additional falsehood in the letter, beyond the misrepresentation concerning the customary fees of other attorneys, the Committee properly allowed amendment of the charge.*

Since the amended charge related to the same letter which was the subject of the original charge, simply recited another reason why the letter was false and misleading, and was not based on evidence presented by petitioner in defense to the original charges, *Ruffalo* has no application here. Moreover, as in *Zauderer*, petitioner was given ample opportunity to present the Committee with rebuttal evidence to the amended charge, and had a full and fair opportunity to defend against the charge in the subsequent proceedings before the Supreme Court of New Jersey. Hence his claims of due process violation are insubstantial and do not merit review by this Court.

CONCLUSION

The petition in this case presents no issues requiring review by this Court. Petitioner was properly disciplined,

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* As this court recognized in *Shapero*, the Supreme Court of New Jersey and its Advertising Committee were well within their constitutional authority in "requir[ing] the lawyer to prove the truth of the fact stated" in his advertisement. 486 *U.S.* at 477.

through a public reprimand, for sending a false and misleading advertisement to the family of a recent disaster victim at a time when he knew or should have known that the family was unable to make a reasoned judgment concerning retention of counsel. The Supreme Court of New Jersey has placed reasonable, and very limited, restrictions on attorneys' ability to send targeted direct mail solicitations to the families of victims of disastrous accidents. Moreover, the rule is currently under reconsideration to determine if its limitations can be made still more precise. For all of these reasons, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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